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October 30, 1997

Office of the Secretary
Federal Communications Commission
1919 M St. N.W.
Washington, D.C. 20554

Re: Comments of Fant Broadcasting Co.
Notice of Proposed Rule Making
MM Docket No. 97-182

Dear Sirs:

Enclosed please find the original of the above-referenced comments. A faxed copy of these comments were delivered to the Commission on October 30, 1997.

Very truly yours,

Jeffrey S. Baker

Enclosure

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Re: Comments of Fant Broadcasting Co.
Notice of Proposed Rule Making
MM Docket No. 97-182

Dear Sirs:

We represent Fant Broadcasting Co. (Fant) and have been requested to submit comments on their behalf in support of the petition for rulemaking which seeks to preempt local zoning and land use restrictions on the siting, placement and construction of broadcast station transmission facilities. We have represented Fant for several months in obtaining the necessary local land use approvals to construct the transmission tower for new television station WAQF-TV, serving Batavia, New York (FCC Construction Permit No. BCPT-95032OKO). We are making these comments based upon our experience representing Fant, as well our extensive experience with zoning and environmental impact review compliance in New York State.

Through these comments it is intended that the Commission will benefit from our expertise and understand the obstacles New York laws present to the efficient construction of broadcast transmission facilities. We are one of the leading environmental and land use law firms in New York. We represent a wide range of large and small companies, public utilities, telecommunications providers, municipalities and environmental organizations on land use and environmental permitting measures. We are particularly experienced with issues of environmental impact review. It is from that experience that we are able to note that the benefits of zoning and environmental impact review are often lost when applied at the local level to broadcast transmission facilities. What should be a rational planning exercise often becomes a tangle of

politics driven by emotional pleas, and results in extraordinary delays which only serve to hinder the national policy of establishing a system of free broadcast services.

Zoning and Environmental Review in New York

To appreciate the need for Federal preemption of siting issues, it is necessary to understand the legal framework in New York and how it is often applied in practice.

New York is a very strong "Home Rule" state. There is no zoning or planning at the State level. There is also very little planning at the County level. Virtually all land use decisions are reserved to cities, towns and villages through local zoning. Municipalities' authority to adopt zoning derives from state law which establishes the broad parameters of traditional Euclidian Zoning. However, each municipality adopts its own zoning code and there are significant differences in the codes. More importantly, zoning is administered by local Planning Boards and Zoning Boards of Appeal composed of lay citizens. The expertise of local boards varies widely. Many are unfamiliar with complex legal and technical issues and are uncomfortable dealing with controversial projects. This contributes to widely disparate results.

Zoning laws are only half of the equation. A larger issue is presented by the State Environmental Quality Review Act ("SEQRA" N.Y.S. Environmental Conservation Law, Article 8). SEQRA is modelled after the National Environmental Policy Act ("NEPA"), 42 U.S.C. Sec. 4321 et seq. As applied to transmission towers, every approval by a local board under a zoning code is subject to review under SEQRA. This requires the local board to examine the potential effects of the project on the environment. If the board determines that there is a potentially significant adverse impact on the environment, then an Environmental Impact Statement ("EIS") must be prepared. This is an expensive and time-consuming process which, in order for a project to be approved, must result in a finding by the board that from among the various alternatives, the chosen project minimizes or avoids the identified adverse environmental impacts to the maximum extent practicable "consistent with social, economic and other essential considerations". (N.Y.S. Environmental Conservation Law §8-0109(8)].

The Effect on Transmission Towers

SEQRA is an invaluable planning tool. Like NEPA, SEQRA works like a filter through which the decision-making process flows. SEQRA does not dictate a particular outcome, nor does it require a mechanical thought process which disregards common sense and public policy considerations. SEQRA has been very useful in modifying projects during the review process in response to legitimate environmental concerns.

In the context of broadcast facilities, rather than being useful planning tools, zoning laws and SEQRA are often used by municipalities and local citizens as tools to further NIMBY ("Not-in-my-backyard") goals. Because each municipality is a separate jurisdiction and there is no higher governmental body with the authority to override local opposition to siting, towns often feel emboldened to place many obstacles in front of an applicant in the hope that they will move somewhere else.

Local boards will often acquiesce to local opposition because of the inequitable political position between an applicant and local citizens. A television or radio transmission tower does not provide large benefits to a town (i.e., better reception) that could not be obtained from a neighboring town. These facilities do not create many jobs and their contribution to the tax base is usually not enough to override local opposition. Moreover, the applicant is not a town resident. On the other hand, Planning Board and Zoning Board of Appeals members are unpaid volunteers who live in the community and have to answer to their neighbors who may be virulently opposed to a tower. Even when the neighbors' concerns are unfounded and the board recognizes the applicant's right to the permit, the board will often prefer a court to order issuance of a permit rather then taking the political "heat" that would result from issuing the permit themselves. In those cases, local politicians can claim they tried to stand up to "outside" interests, but the courts overruled them.

There is little contemporary experience in New York with the siting of television and radio broadcast towers. Most facilities were constructed prior to 1975 when SEQRA was enacted. Thus most towers avoided many of the contentious issues now facing establishment of DTV facilities and the build-out of other broadcast facilities. We are experiencing those problems now with the Fant application for the Batavia station. Furthermore, we can readily anticipate the future controversies based upon our experience with cellular telephone towers whose problems have only been partially alleviated with the passage of the Telecommunications Act of 1996.

The overlay of a SEQRA review with review of zoning issues, results in local boards usually focusing on two issues - RF emissions and interference, and aesthetic impacts. Both issues can result in an endless process for the applicant.

The Commission is well aware of the repeated issues which arise concerning allegations of RF emissions and interference. The Telecommunications Act of 1996 explicitly removed that issue from the siting of cellular facilities and the same rule should be adopted for broadcast transmission facilities. The need for preemption is best illustrated by Fant's experience at a recent Planning Board hearing in the Town of Pavilion, New York on Fant's application for the Batavia station. Fant produced a medical expert with extensive experience with RF issues who testified about the absence of adverse health effects for a facility operating within FCC license requirements. Local citizens testified in opposition, selectively quoting from a number of

documents, including FCC's OET Bulletin No. 56 "Questions and Answers About Biological Effects and Potential Hazards of Radiofrequency Radiation." Their essential argument was - that if the Town and FCC are unsure of the long-term effects and cannot guarantee no adverse effects, the tower should not be approved. Despite the fact that no expert testimony was offered to counter that presented by Fant, enough Planning Board members were influenced by their neighbors' concerns, that the application was not approved. Because of the inchoate fears of the public, Fant was placed in the untenable position of having to prove a negative.

The other common issue of concern is aesthetic or visual impact. SEQRA recognizes that aesthetic resources are an element of the environment which should be protected. The SEQRA statute refers to "objects of aesthetic significance" [ECL § 8-0105(6)] and the implementing regulations refer to "the impairment of the character or quality of important . . . aesthetic resources" [6 New York Codes Rules and Regulations Sec. 617.7(c)(1)(v)]. This focus of aesthetic concern on important resources rather than an individual's vistas, has been confirmed by the New York State Court of Appeals in Matter of WEOK Broadcasting Corp. v. Planning Board of the Town of Lloyd, 79 N.Y.2d 373, 592 N.E.2d 778 (1992) [A copy of the decision is attached].

Nevertheless, local boards consistently view the relevant aesthetic issues as whether a neighbor will view the tower from his or her house and whether the impact on the view is significant, thus triggering an Environmental Impact Statement. Since someone will always be able to see a broadcast tower, it is an inescapable obstacle which often requires the applicant to prepare an EIS. That requirement is no minor matter. An EIS typically will cost between $100,000 and $250,000 and can easily cost more depending on the delay and variety of demands for more information made by the local board. The process will typically take 6 to 9 months to complete and still require the applicant to resort to litigation to gain its right to construct. The WEOK Broadcasting decision provides a useful example of the obstacles faced by an applicant under those circumstances.

In WEOK, a broadcasting corporation submitted an application to the Planning Board of the Town of Lloyd for site plan approval to build an AM Radio Transmitter Facility. The Board required the applicant to prepare an EIS to consider, among other things, the tower's visual impact from nine different locations including a National Historic Landmark. The applicant complied with the Planning Board's request and accordingly, prepared a draft EIS, went through the comment and hearing process and prepared a final EIS. The final EIS contained a variety of measures designed to mitigate the visual effect of the towers. Despite the applicant's efforts, the Planning Board denied the site plan approval.

The applicant challenged the Planning Board's decision in New York State Supreme Court. (New York's trial level court) The court annulled the Planning Board's determination and granted the application for site plan approval. The Planning Board then appealed the court's

decision to the appellate division which affirmed the lower court. In affirming the lower court, the appellate division noted that the denial of the application was based merely on aesthetic reasons alone, and on that basis, the determination lacked a substantial evidentiary basis in the record. The Planning Board then appealed to the New York Court of Appeals, the state's highest court.

In reviewing the Planning Board's determination, the Court of Appeals noted that the applicant had prepared a detailed Visual Impact Analysis concluding that there would be no visual impact. Regardless, the Planning Board had determined that the towers *might* be visible based on statements from some community members, agencies and other organizations. The Court noted that the comments and statements from community members and agencies were not supported by any factual data and were, at best, mere conjecture. Accordingly, the record contained "no factual evidence, expert or otherwise, to counter the extensive factual evidence submitted by petitioner." 79 N.Y.2d at 384. "[G]eneralized community objections such as those offered here in response to the comprehensive data provided by the petitioner, cannot, alone, constitute substantial evidence, especially in circumstances where there was ample opportunity for respondent to have produced reliable, contrary evidence." Id. Therefore, the Court of Appeals upheld both the supreme court and the appellate division in finding that the Planning Board's determination was not supported by substantial evidence. Accordingly, the applicant finally received site plan approval.

The WEOK case is illustrative of how, even with the expense of detailed analysis and even when the focus is on a truly public resource, a local board bolstered by local opposition will go to extreme lengths to frustrate a project. From its first application in 1988 until the final court decision in 1992, nearly four years had lapsed before WEOK was able to build.

The Woodstock Experience

A prime example of how aesthetic impact analysis can be abused by a town under the guise of SEQRA is an experience we had representing Cellular One of Upstate New York, Inc. in the Town of Woodstock, New York. The application was for the construction of a cellular telephone tower. The application was for a site located on Overlook Mountain in Woodstock. Overlook Mountain is an important landmark in the region, serving as an important backdrop for the 19th-century Hudson River School of Painters and has a significant emotional importance to the people of the area.

In the mid-1980's two towers were built on Overlook Mountain. One, a 300^{+}-foot lighted guyed-television tower and a second 120 foot unlighted guyed radio tower. The 300-foot lighted tower caused a significant uproar in the community after it was constructed, yet it survived after-the-fact challenges to its approvals. In 1995 our client sought to place its broadcast antennae and

microwave dishes on the 120-foot tower. The proposal required reconstructing the tower as a self-supporting structure to bear the weight of the cellular equipment. The existing 120-foot tower was to be dismantled, with all of the equipment moved to the replacement tower to handle the combined uses. The proposed tower, was the exact same height as the existing tower, literally 30 feet away and would continue to be unlighted. The tower was necessary to provide both broadcast cellular service to the area and a microwave transmission link over the mountain which presented a significant topographic barrier.

With the initial application to the Town Planning Board, we submitted an extensive visual analysis including computer simulated comparisons of the existing and proposed tower with views taken from a variety of locations around town. While one could see a small difference between the two towers given the greater width of the self-supporting structure, there was by any rational and objective analysis, no significant change between the two and certainly no significant adverse impact on the environment. Nevertheless, the Planning Board required the applicant to prepare a detailed EIS. At the public hearings, it became very evident that 95 percent of the opponents could not understand that what was being proposed was not another 300-foot lighted tower, but replacement of the smaller tower which was not visible from the majority of the town. Many town residents, including several Planning Board members had an absolute opposition to <u>any</u> tower on the mountain and were not ashamed to use any means at their disposal to frustrate the application.

As a result of the enormous expense incurred by the Planning Board's demands and the prospect of only greater further expense being required in order to ultimately prevail, including likely litigation, the application has been suspended and may eventually be withdrawn. The net result has been unnecessary expense to the cellular provider which, of course, must be passed on to its rate payers; but more importantly, inadequate service being able to be provided to the area. The applicant spent more than a year in the process before it suspended activities. It faced at least another year of local process, plus litigation, and conceivably much longer. Thus, delay often halts a project.

• • •

What is missed in the SEQRA process is that siting of broadcast facilities is already constrained by FCC and FAA requirements, leaving an applicant with a limited choice of locations to site its tower. An EIS usually does not provide any additional information germane to the decision. It only serves to delay the decision, increase the cost to the applicant and attempt to divert the application to another town. If towns are allowed to use the SEQRA and zoning process to try to relocate a tower from one town to another, the applicant can be faced with an endless process of being bounced from one community to another, as each town responds to the NIMBY concerns of its citizens.

Comments on the Proposed Rule

Fant Broadcasting supports the proposed rule as the best means to ensure that over-the-air broadcast facilities can be constructed without undue interference. Local land use controls are appropriate for legitimate purposes, but they should not be abused under a pretext of broader environmental concerns. We suggest that the proposed rule be adopted with the following specific suggestions:

1. We specifically support the proposed paragraph (b)(1) as necessary to preclude repeated efforts to prove what has already been definitively established by the FCC with regard to RF, and the recognized exclusive authority of the FAA.

2. The proposed timeframes on decisions may not actually preempt SEQRA. A specific rule should be issued preempting state and locally based environmental impact review. The rule should allow local environmental review when the proposed project will have a visual impact on a publicly-owned or operated parkland, recreation area or designated open space, any site on the Register of National Natural Landmarks or any historic building, structure or facility listed on the National Register of Historic Places or a State equivalent. This will assure that important, truly public resources are protected.

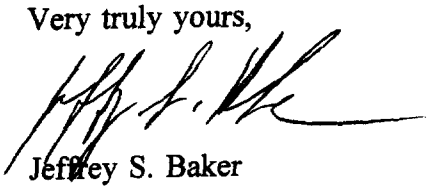
3. Traditional zoning controls should be allowed, provided decisions are made consistent with the proposed time frames and provided municipalities do not attempt to zone towers out of their jurisdiction.

4. The Commission should establish, by rule, that for the purposes of local zoning, broadcast transmission facilities are considered to be public utilities. This is appropriate due to the limited licenses that are available from the FCC, the licensee's obligation to provide sufficient signal strength throughout the license area, the FAA requirements for aviation safety and FCC's limitations to protect against RF interference.

Finally, FCC preemption of local regulation, as proposed would also serve the goals of environmental justice. The U.S.E.P.A. has recognized environmental justice as an important policy to avoid the common practice of locating unpopular land-uses in low-income communities. In this context, communities with more sophisticated zoning and active citizenry, with the resources to fight a tower are more likely to succeed than poorer communities. Thus, towers may be located not where they optimize service, but in communities without the wherewithal to oppose the application. Federal preemption will level the playing field and allow for siting on a more objective basis.

We urge the Commission to consider these comments and adopt a rule which injects reason into the siting process.

Very truly yours,



Jeffrey S. Baker

cc: Fant Broadcasting

*170 583 N.Y.S.2d 170

79 N.Y.2d 373, 592 N.E.2d 778, Util. L. Rep. P 26,202

In the Matter of WEOK BROADCASTING CORPORATION, Respondent,
v.
PLANNING BOARD OF THE TOWN OF LLOYD, Appellant.

Court of Appeals of New York.
April 3, 1992.

Applicant for site plan approval to construct radio transmission towers brought Article 78 proceeding to review town planning board's denial of application. The Supreme Court, Ulster County, Bradley, J., annulled determination, and appeal was taken. The Supreme Court, Appellate Division, 165 A.D.2d 578, 568 N.Y.S.2d 974, affirmed, and further appeal was taken. The Court of Appeals, Alexander, J., held that town planning board's denial of application pursuant to State Environmental Quality Review Act (SEQRA), on ground that towers threatened aesthetic impairment of environment, was not supported by substantial evidence.

Affirmed.

1. HEALTH AND ENVIRONMENT ⚖25.10(1)
199 ----
199II Regulations and Offenses
199k25.5 Environmental Protection in General
199k25.10 Environmental Impact Statement
199k25.10(1) In general.
N.Y. 1992.
Aesthetic considerations are proper area of concern in agency's State Environmental Quality Review Act (SEQRA) analysis. McKinney's ECL §§ 8-0103, subd. 1, 8-0105, subd. 6.

2. HEALTH AND ENVIRONMENT ⚖25.10(5)
199 ----
199II Regulations and Offenses
199k25.5 Environmental Protection in General
199k25.10 Environmental Impact Statement
199k25.10(2) Necessity for Statement
199k25.10(5) Determination of necessity.
N.Y. 1992.
Regardless of whether agency conducting State Environmental Quality Review Act (SEQRA) analysis proposes to approve or reject project, it must take sufficiently "hard look" at proposal and must set forth reasoned elaboration for its determination. McKinney's ECL § 8-0101 et seq.

3. ZONING AND PLANNING ⚖358.1
414 ----
414VII Administration in General
414k358 Procedure
414k358.1 In general.

Formerly 414k358
N.Y. 1992.
Except where proposed action is zoning amendment, State Environmental Quality Review Act (SEQRA) review may not serve as vehicle for adjudicating legal issues concerning compliance with local government zoning. McKinney's ECL § 8-0101 et seq.

4. ZONING AND PLANNING ⚖384.1
414 ----
414VIII Permits, Certificates and Approvals
414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 In general.

Formerly 414k384
N.Y. 1992.
Where proposed radio tower project was conforming use, alleged violation of local zoning ordinance was not valid basis for denying site plan approval pursuant to State Environmental Quality Review Act (SEQRA). McKinney's ECL § 8-0101 et seq.

5. HEALTH AND ENVIRONMENT ⚖25.10(5)
199 ----
199II Regulations and Offenses
199k25.5 Environmental Protection in General
199k25.10 Environmental Impact Statement
199k25.10(2) Necessity for Statement
199k25.10(5) Determination of necessity.
N.Y. 1992.
Agency conducting State Environmental Quality Review Act (SEQRA) analysis may consider fact that purported project is permitted use in local zoning ordinance; inclusion of use in ordinance is tantamount to legislative finding that use is in harmony with general zoning plan and will not adversely affect local community. McKinney's ECL § 8-0101 et seq.

6. ZONING AND PLANNING ⚖435
414 ----
414VIII Permits, Certificates and Approvals
414VIII(C) Proceedings to Procure

414k435 Evidence and fact questions.
N.Y. 1992.

Town planning board's denial of application for site plan approval to construct radio transmission towers pursuant to State Environmental Quality Review Act (SEQRA), on ground that towers threatened aesthetic impairment of environment, was not supported by substantial evidence; applicant submitted extensive factual evidence indicating that there would be no visual impact upon local historical site, and only evidence that towers might be visible from site consisted of community members' conjecture. McKinney's ECL § 8-0101 et seq.

7. HEALTH AND ENVIRONMENT ⚖25.10(1)
199 ----
199II Regulations and Offenses
199k25.5 Environmental Protection in General
199k25.10 Environmental Impact Statement
199k25.10(1) In general.
N.Y. 1992.

Although aesthetic impact considerations may constitute important factor in review under State Environmental Quality Review Act (SEQRA), negative aesthetic impact considerations, alone, unsupported by substantial evidence, may not serve as basis for denying approval of proposed action. McKinney's ECL § 8-0101 et seq.

[79 N.Y.2d 374] Thomas P. Halley, Poughkeepsie, for appellant.

*171 [79 N.Y.2d 375] [592 N.E.2d 779] David D. Hagstrom, Poughkeepsie, for respondent.

[79 N.Y.2d 376] Drayton Grant, Rhinebeck, for Scenic Hudson, Inc., amicus curiae.

OPINION OF THE COURT

ALEXANDER, Judge.

The respondent Planning Board of the Town of Lloyd denied petitioner WEOK Broadcasting Corporation's application for a site plan approval to construct a radio transmitter facility. [79 N.Y.2d 377] After a review of the application pursuant to SEQRA, the Planning Board determined that petitioner "fail[ed] to adequately minimize or avoid adverse environmental effects to the maximum extent practicable" and that "the environmental effects [identified] in the Environmental Impact Statement process cannot be adequately minimized or avoided by the mitigation measures identified as practical." The Planning Board now appeals pursuant to CPLR 5601(a) from an order of the Appellate Division which affirmed Supreme Court's judgment annulling the Board's determination as not supported by substantial evidence. We agree with the Appellate Division's determination and therefore, for the reasons that follow, the order appealed from should be affirmed.

I

In July 1988, WEOK Broadcasting Corporation (WEOK) submitted an application to the Planning Board of the Town of Lloyd (Board) for site plan approval to build an AM radio transmitter facility consisting of five radio towers in Ulster County. The site is located in a Designed Business zone which allows radio and television towers as a permitted use, subject only to site plan approval by the Planning Board (Town of Lloyd Zoning Ordinance § 100-21[A][3].

Nine months later in April of 1989, the Board issued a positive declaration that the project "may have a significant effect on the environment" (ECL 8-0109[2]. Thus, concerned that the project threatened to impair the environment, the Board directed petitioner to file an Environmental Impact Statement (EIS) which would consider, among other things, the towers' visual impact from nine locations, one of which was the Franklin D. Roosevelt residence, a national historic landmark in Dutchess County. Petitioner prepared and submitted a comprehensive Draft Environmental Impact Statement (DEIS) which included an analysis, prepared by landscape architects, of the visual impact of the proposed towers from these viewpoints. The analysis concluded there would be minor visual impact from six of the identified viewpoints, moderate visual impact from one, and no visual impact from the remaining two viewpoints, the Franklin D. Roosevelt (FDR) home and the Mid-Hudson Bridge. The visual impact analysis from the FDR viewpoint was conducted in the spring of 1989 when the trees surrounding the proposed site were leafless.

[79 N.Y.2d 378] Comment regarding the DEIS was sought and obtained by the Board from various other agencies, including the United States Department of the Interior, the Dutchess County Department of Planning and the Ulster County Planning Board. Comment was also sought from a variety of environmental conservation and historical preservation organizations. Negative comments received from the agencies,

organizations and local residents focused on the potential visual impact of the towers from the FDR viewpoint.

The Board also retained an independent consultant to critique the DEIS. This consultant noted that petitioner had "prepared an in depth analysis which utilized a professional and thorough methodology to objectively assess the visual impact of [the proposed project]." The consultant cautioned, however, that "subjective judgments are inextricably involved in any visual assessment."

A Final EIS (FEIS) was prepared by petitioner addressing the comments and specific concerns identified by respondent's consultant as well as other negative public comments made in response to the DEIS. The FEIS indicated that in an effort to mitigate the effect of the towers and their lighting, petitioner, with the approval of *172 [592 N.E.2d 780] the Federal Communications Commission (FCC), substantially reduced the height of the tallest tower from an optimum height of 445 feet to 245 feet, the minimum height that would meet FCC minimum efficiency standards. In commenting upon this effort, the consultant noted that petitioner was "obviously compromising by reducing tower heights to such an extent." In further mitigation of the objections articulated in the comments on the DEIS, petitioner noted that a variance from the Federal Aviation Administration had been obtained, permitting a reduction in the number of towers required to be lighted from five to two, and allowing petitioner to paint three of the towers gray to minimize their visibility. Additionally, the lighting on the towers was changed from a white strobe to a less visible red and in order to minimize the visual effect of the towers and to blend them in with the surroundings, they were designed as guyed towers with an 18-inch open face lattice instead of self-supporting towers tapering from an 18- to 20-foot base to two to three feet at the top.

The Board denied site plan approval in December 1989. It cited, *inter alia*, the following reasons for the denial: the Visual Impact Statement was unpersuasive in its analysis and was subject to conflicting interpretations and conclusions; [79 N.Y.2d 379] there was a possibility that the towers would be visible from the FDR homestead; there was no direct financial benefit to be derived by the Town of Lloyd from the construction of the towers; the proposed action would be in "sharp contrast with the orderly development of the area and the district in which the proposed towers will be located, and therefore violates criteria set forth in section 100-8.2 of Zoning Ordinance"; because local property owners found the lighting objectionable, the towers would be incompatible with section 100-13 of the Zoning Ordinance; the height of the towers, in excess of 200 feet, could not be mitigated further without limiting or eliminating the towers' functions; and, approval of petitioner's application might create a precedent for future development of this type, threatening the ability of the area to develop as envisioned by the existing Master Plan.

This CPLR article 78 proceeding challenging the Board's determination followed. Petitioner alleged that the Board's determination was not supported by substantial evidence and was in fact contrary to a determination made by the Town of Lloyd Zoning Board of Appeals earlier that year in a SEQRA review, in which the Planning Board concurred, approving another transmission tower project known as the Walker Tower. The Walker Tower project involved the construction of a 400-foot-high FM radio transmission tower and accessory building at the southerly end of Illinois mountain in the Town of Lloyd which tower could be seen from both the FDR home and the Hudson River and in respect to which a special use permit was required.

Supreme Court annulled respondent's determination and granted petitioner's application for site plan approval. That court found "nothing in the record other than generalized complaints voiced at the public hearings * * * contradicted [the report of the Town's consultant] or WEOK's visual study." The Appellate Division, with two Justices dissenting, affirmed. That court noted that both parties acknowledged that respondent's denial of petitioner's application was based on aesthetic reasons alone and concluded, *inter alia*, that "[w]hile petitioner's EISes demonstrated that it minimized negative visual impacts to the greatest extent practical, respondent failed to furnish any rationale for completely disregarding petitioner's comprehensive and extensive visual impact analysis" and that "[a]s the only apparent grounds for denying petitioner's application consisted of generalized community objections, which are contrary to the data provided, [79 N.Y.2d 380] respondent's determination lacks a substantial evidence basis in the record" (165 A.D.2d 578, 581-582, 568 N.Y.S.2d 974).

The dissenting Justices would have dismissed the petition, noting that "aesthetic impact is a proper and valid basis for environmental review" and finding that

respondent "expresse[d] cogent reasons for not *173 [592 N.E.2d 781] giving conclusive weight to the study, reasons which were not overcome by petitioner's responses to comments on the study contained in the final environmental impact statement" (*id.*, at 582, 584, 568 N.Y.S.2d 974). Thus, the dissenters would find the determination supported by substantial evidence. Although the majority at the Appellate Division did not reach the issue of the prior approval of the Walker Tower project, the dissenters concluded that "the facts and circumstances of the earlier project were so completely dissimilar to the instant application as to not constitute a prior precedent requiring either approval of petitioner's application by respondent or an explanation of its reasons for reaching a different result"(*id.*, at 585, 568 N.Y.S.2d 974). This appeal ensued.

II

[1] The Legislature's stated purpose in enacting SEQRA was to "declare a state policy which will encourage productive and enjoyable harmony between [people and their] environment; to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the state" (ECL 8-0101). Thus, the primary purpose of SEQRA "is to inject environmental considerations directly into governmental decision making" (*Matter of Coca-Cola Bottling Co. v. Board of Estimate*, 72 N.Y.2d 674, 679, 536 N.Y.S.2d 33, 532 N.E.2d 1261; *see also, Akpan v. Koch*, 75 N.Y.2d 561, 569, 555 N.Y.S.2d 16, 554 N.E.2d 53). In furtherance of that purpose, the information obtained by lead agencies through the SEQRA process enables State and local officials to intelligently "assess and weigh the environmental factors, along with social, economic and other relevant considerations in determining whether or not a project or activity should be approved or undertaken in the best over-all interest of the people of the State" (*Matter of Town of Henrietta v. Department of Envtl. Conservation*, 76 A.D.2d 215, 222, 430 N.Y.S.2d 440; 1975 N.Y.Legis.Ann., at 438-439). SEQRA seeks to "strike a balance between social and economic goals and concerns about the environment" (*Matter of Jackson v. New York State Urban Dev. Corp.*, [79 N.Y.2d 381] 67 N.Y.2d 400, 414, 503 N.Y.S.2d 298, 494 N.E.2d 429), by requiring an agency to engage in a systematic balancing analysis in every instance (*Matter of Town of Henrietta v. Department of Envtl. Conservation, supra*, 76 A.D.2d at 223, 430 N.Y.S.2d 440). Aesthetic considerations are a proper area of concern in this balancing analysis inasmuch as the Legislature has declared that the "maintenance of a quality environment * * * that at all times is healthful and *pleasing to the senses*" is a matter of State-wide concern (ECL 8-0103[1] [emphasis added]; *see also*, ECL 8-0105[6].

To achieve these purposes and goals, SEQRA imposes procedural and substantive requirements upon the agency charged with decision making in respect to proposed "actions". (FN1) Whenever it is determined that a proposed "action" may have a significant effect on the environment, a DEIS is required to be prepared and various other procedural steps are to be taken including soliciting comments on the DEIS, holding public hearings when appropriate (ECL 8-0109, 8-0105[7]; 6 NYCRR 617.8) and preparing and filing a FEIS in respect to which comments are solicited and any further appropriate public hearing held (6 NYCRR 617.10[g]. In addition to the procedural requirements, (FN2) SEQRA imposes substantive requirements which include listing the various types of information that must be included in the EIS, a description of the proposed action with an assessment of its environmental impact and any unavoidable adverse environmental effects [592 N.E.2d 782] *174 (ECL 8-0109[2][a]-[c] and mitigation measures proposed to minimize the environmental impact (ECL 8-0109[2][f].

[2] If an agency proposes to approve a project, it must consider the FEIS and prepare written findings that the requirements of SEQRA have been met (ECL 8-0109[8]. It must also prepare a written statement of the facts and conclusions in the FEIS and comments relied upon and the social, economic and other factors and standards which form the basis of its decision (6 NYCRR 617.9[c]. Put differently, the agency must take a sufficiently "hard look" at the proposal before making its final determination and must set forth a reasoned elaboration for its determination (*see, Akpan v. Koch*, 75 N.Y.2d 561, [79 N.Y.2d 382] 570, 555 N.Y.S.2d 16, 554 N.E.2d 53, *supra; Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 415-416, 503 N.Y.S.2d 298, 494 N.E.2d 429, *supra)*. Where an agency determines to reject a proposed project, it must likewise take a sufficiently "hard look" and set forth a reasoned elaboration for its determination (*see, Matter of Jackson v. New York State Urban Dev. Corp., supra*, at 416, 503 N.Y.S.2d 298, 494 N.E.2d 429). As we have only recently observed, "[a]n agency's compliance with its substantive SEQRA obligations is governed by a rule

of reason and the extent to which particular environmental factors are to be considered varies in accordance with the circumstances and nature of particular proposals" (*Akpan v. Koch*, 75 N.Y.2d 561, 570, 555 N.Y.S.2d 16, 554 N.E.2d 53, *supra; see also, Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 503 N.Y.S.2d 298, 494 N.E.2d 429, *supra).*

The Board stated that it rejected petitioner's site plan because the plan "failed to adequately minimize or avoid adverse environmental effects to the maximum extent practicable" and because the "environmental effects revealed in the Environmental Impact Statement process can not be adequately minimized or avoided by the mitigation measures identified as practical." The Board based its determination primarily upon the project's failure to comply with various zoning requirements and the fact that the towers "*may* be visible [from the FDR homestead]" and that local property owners found the lighting objectionable.

[3][4] To the extent the Board's determination is based upon the alleged failure of the plan to conform with various zoning regulations, we note, as did the Appellate Division, that except where the proposed action is a zoning amendment, SEQRA review may not serve as a vehicle for adjudicating "legal issues concerning compliance with local government zoning" (*Matter of Town of Poughkeepsie v. Flacke*, 84 A.D.2d 1, 5, 445 N.Y.S.2d 233, *lv. denied*, 57 N.Y.2d 602, 454 N.Y.S.2d 1026, 439 N.E.2d 1245). Indeed, ECL 8-0103(6) specifically provides in pertinent part that "the provisions of this article do not change the jurisdiction between or among state agencies and public corporations" (*see also, Matter of Town of Poughkeepsie v. Flacke, supra;* Gerrard, Ruzow, Weinberg, Environmental Impact Review in New York § 8.14, at 8-55). We assume, as did the Appellate Division, that the proposed WEOK project was a conforming use and conclude that alleged violations of the Lloyd Zoning Ordinance were not a valid basis for denying site plan approval pursuant to SEQRA.

[5] That is not to say that local zoning laws are irrelevant to determinations made pursuant to SEQRA. They are indeed [79 N.Y.2d 383] relevant. For example, the inclusion of a permitted use in a local zoning ordinance is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the local community (*RPM Motors v. Gulotta*, 88 A.D.2d 658, 450 N.Y.S.2d 525). Thus, here, although by no means determinative, it should not be overlooked that the aesthetic visual impact of the towers, was, we presume, considered at the time that radio and television towers were included as permitted uses in the Designed Business zone (*see, Matter of North Shore Steak House v. Board of Appeals*, 30 N.Y.2d 238, 243, 331 N.Y.S.2d 645, 282 N.E.2d 606; *RPM Motors v. Gulotta, supra).*

*175 [592 N.E.2d 783] Compliance with the zoning law aside, the question remains, however, whether the Board otherwise has made a reasoned elaboration resulting from its "hard look" pursuant to SEQRA review such that it can be concluded that its findings and determination are supported by substantial evidence.

[6] The often stated rule regarding our role in reviewing SEQRA determinations needs no extended discussion; it is not to weigh the desirability of any proposed action or to choose among alternatives and procedural requirements of SEQRA and the regulations implementing it (*Matter of Village of Westbury v. Department of Transp.*, 75 N.Y.2d 62, 66, 550 N.Y.S.2d 604, 549 N.E.2d 1175), but to determine whether the agency took a "hard look" at the proposed project and made a "reasoned elaboration" of the basis for its determination (*Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 503 N.Y.S.2d 298, 494 N.E.2d 429, *supra).* Where an agency fails to take the requisite hard look and make a reasoned elaboration, or its determination is affected by an error of law, or its decision was not rational, or is arbitrary and capricious or not supported by substantial evidence, the agency's determination may be annulled (*see,* CPLR 7803[3]; *Chinese Staff & Workers Assn. v. City of New York*, 68 N.Y.2d 359, 363, 509 N.Y.S.2d 499, 502 N.E.2d 176; *Matter of Jackson v. New York State Urban Dev. Corp., supra; see generally,* 55 N.Y.Jur.2d, Environmental Rights, § 65). Here, we conclude that the Board's determination should be annulled because it is not supported by substantial evidence--substantial evidence being "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*300 Gramatan Ave. Assocs. v. State Div. of Human Rights*, 45 N.Y.2d 176, 180, 408 N.Y.S.2d 54, 379 N.E.2d 1183) or " 'the kind of evidence on which responsible persons are accustomed to rely in serious affairs' " (*People ex rel. Vega v. Smith*, 66 N.Y.2d 130, 139, 495 N.Y.S.2d 332).

[79 N.Y.2d 384] Notwithstanding petitioner's

detailed Visual Impact Analysis which concluded that there would be no visual impact from the FDR site, the Planning Board determined that the towers *might* be visible from the FDR site. In so concluding, the Board relied on statements from some community members, agencies and other organizations, some of whom stated there *might* be a visual impact and others who stated that there definitely would be a visual impact. Critical to those views regarding visual impact from the FDR site was the supposition that the visual impact study was conducted under optimal conditions which impacted positively on the results of the study. Thus, the study was viewed as ambiguous and not establishing that under all conditions and at other times of the year, the condition of the foliage between the FDR site and the radio towers would be the same and would block the view from the FDR site; if the conditions and density of the foliage were less, there would be greater visibility of the towers. This reasoning is flawed, however, because the record demonstrates that at the time the visual impact study was conducted, there were *no* leaves on the trees. Thus, petitioner's evidence of the visual impact from the FDR site was based on observations made under the *least* desirable conditions--when visibility of a tower radio transmitting facility would be greatest. Moreover, the comments and statements from community members and agencies do not appear to be supported by any factual data and at best are mere conjecture. Respondent's finding that there *may* be a visual impact from the FDR homestead is unsupported by any factual data, scientific authority or any explanatory information such as would constitute substantial evidence. Thus, respondent's conclusory finding that there would be an unacceptable negative aesthetic impact from the FDR viewpoint cannot be deemed a "reasoned elaboration" of its determination (*see, Matter of Tehan v. Scrivani,* 97 A.D.2d 769, 771, 468 N.Y.S.2d 402).

Although a particular kind or quantum of "expert" evidence is not necessary in every case to support an agency's SEQRA determination, here, the record contains no factual evidence, expert or otherwise, to ***176.** [592 N.E.2d 784] counter the extensive factual evidence submitted by petitioner. To permit SEQRA determinations to be based on no more than generalized, speculative comments and opinions of local residents and other agencies, would authorize agencies conducting SEQRA reviews to exercise unbridled discretion in making their determinations and [79 N.Y.2d 385] would not fulfill SEQRA's mandate that a balance be struck between social and economic goals and concerns about the environment (*see, Matter of Jackson v. New York State Urban Dev. Corp., supra).* Nor could it be said that such a determination accords with "a rule of reason" (*see, Akpan v. Koch, supra).* As one commentator has noted, "decision makers must not be given the freedom to either ignore or disregard the information that the environmental review process was designed to elicit if the process is to have any meaning" (Gitlen, *The Substantive Impact of the SEQRA,* 46 Albany L.Rev. 1241, 1253).

We do not intend to diminish in any way the importance of public comment with respect to any proposed site plan; SEQRA is designed to encourage public participation in the review process (ECL 8-0109[4]-[6]. However, generalized community objections such as those offered here in response to the comprehensive data provided by petitioner, cannot, alone, constitute substantial evidence, especially in circumstances where there was ample opportunity for respondent to have produced reliable, contrary evidence (*see, Matter of North Shore Steak House v. Board of Appeals,* 30 N.Y.2d 238, 245, 331 N.Y.S.2d 645, 282 N.E.2d 606, *supra; Matter of Veysey v. Zoning Bd. of Appeals,* 154 A.D.2d 819, 546 N.Y.S.2d 254, *lv. denied,* 75 N.Y.2d 708, 554 N.Y.S.2d 833, 553 N.E.2d 1343; *Syracuse Bros. v. Darcy,* 127 A.D.2d 588, 511 N.Y.S.2d 389).

[7] We reject petitioner's contention that negative aesthetic impact factors may not constitute a sufficient basis upon which SEQRA determinations may be made. Indeed, as we noted earlier, aesthetic impact considerations may constitute an important factor in SEQRA review. Negative aesthetic impact considerations, alone, however, unsupported by substantial evidence, may not serve as a basis for denying approval of a proposed "action" pursuant to SEQRA review.

In view of our holding that respondent's determination was not supported by substantial evidence, we find no need to address petitioner's remaining arguments, including its contention regarding the Walker Tower. Accordingly, the order of the Appellate Division should be affirmed, with costs.

WACHTLER, C.J., and KAYE, TITONE, HANCOCK and BELLACOSA, JJ., concur.

SIMONS, J., taking no part.

Order affirmed, with costs.

FN1. "Actions" are of various types and include "projects or activities directly undertaken by any agency * * * or projects or activities involving the issuance to a person of a lease, permit, license, certificate or other entitlement for use or permission to act by one or more agencies; [and] policy, regulations, and procedure-making" (ECL 8-0105[4].

FN2. No issue is raised on this appeal as to full compliance by the Board with the procedural requirements of SEQRA.